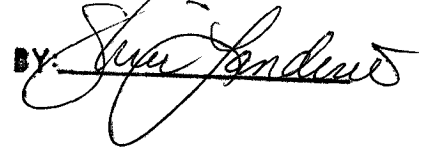


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ARIZONA SUPERIOR COURT

YAVAPAI COUNTY

STATE OF ARIZONA,

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

No. P1300CR20081339

**REPLY IN SUPPORT OF  
WESTERN NEWS&INFO, INC.'S  
APPLICATION FOR LEAVE TO  
INTERVENE FOR LIMITED  
PURPOSE OF MOVING TO  
UNSEAL COURT RECORDS  
AND PROCEEDINGS**

(Assigned to the Honorable  
Warren R. Darrow)

[Expedited Oral Argument  
Requested]

Preliminary Statement

In responding to WNI's Application, the State agrees that the Court should review the sealed records and proceedings, make the necessary factual findings that might justify any continued closure and release the remainder. For his part, however, Defendant advances the extreme proposition that public access to all materials that have been sealed to date should be foreclosed – notwithstanding decades of First Amendment and Arizona jurisprudence to the contrary. Defendant makes that assertion without showing that the Court provided notice and made on-the-record findings, as required by the First Amendment and Arizona law, *before* sealing each of the records listed in Exhibit 1 to WNI's Application. Defendant also fails to establish that whatever

1 compelling interests might be at stake would in fact be injured by disclosure – or could  
2 not be protected by less restrictive means. The only case Defendant cites specifically  
3 recognizes that such findings must be made, and that the Court must consider  
4 alternatives to secrecy. Moreover, Defendant’s mere assertion of his fair trial right,  
5 without any support, is insufficient to deny public access. His contentions that a proper  
6 review of each sealed record is somehow impossible, and that WNI’s Application is  
7 untimely, also lack merit. Accordingly, WNI asks the Court to review the sealed  
8 records, and release those that fail to meet the high hurdles for closure.

9 Argument

10 I. THE STANDARDS FOR CLOSURE UNDER THE FIRST AMENDMENT  
11 AND ARIZONA LAW HAVE NOT BEEN MET.

12 The parties have not – and cannot – dispute that the First Amendment requires  
13 this Court to provide public notice and make specific findings that the closure of a  
14 judicial record is essential to preserve a compelling interest and is narrowly tailored to  
15 protect that interest. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14 (1986)  
16 (“*Press-Enterprise II*”). Likewise, the parties do not dispute Arizona’s constitutional  
17 right of access. *See, e.g., Mountain States Tel. & Tel. Co. v. Ariz. Corp. Comm’n*, 160  
18 Ariz. 350, 354-55, 773 P.2d 455, 459-60 (1989) (noting that Ariz. Const., art. II, § 6 is  
19 broader than the First Amendment, and that Arizona courts recognized a constitutional  
20 right of access nearly ten years before that right was found in the First Amendment). To  
21 overcome the strong presumption of open records under Arizona law, the Court must  
22 demonstrate specifically how disclosure of *each* record at issue would harm interests of  
23 privacy, confidentiality or the best interests of the state. Ariz. R. Sup. Ct. 123(c)(1).

24 Defendant cannot satisfy these stringent standards merely by invoking his fair  
25 trial right. [Objection at 2.] In *Press-Enterprise II*, the Supreme Court made clear that,  
26 if the interest asserted is the right to a fair trial, closure must be based on “specific  
27 findings” that there is a “substantial probability” that Defendant’s right to a fair trial  
28 “will be prejudiced by publicity that closure would prevent” and that “reasonable

1 alternatives to closure cannot adequately protect the defendant's fair trial rights." 478  
2 U.S. at 14. Yet Defendant offers *no* explanation of how unsealing the records would  
3 prejudice his case. This first-degree murder trial has been highly publicized since its  
4 inception. How any additional media coverage or public scrutiny would infringe  
5 Defendant's rights is entirely unclear, especially when the jurors presumably have been  
6 admonished to rely only on the information obtained in the courtroom and to disregard  
7 media coverage. Rather than identify facts showing a "substantial probability" of harm,  
8 Defendant vaguely refers to, among other topics that supposedly justify sealing,  
9 "counsel-related issues" and Ariz. R. Crim. P. 15.9. [Objection at 3.] Without specifics,  
10 Defendant fails to meet the high standard for closure set forth in *Press-Enterprise II* and  
11 the other authorities cited in WNI's Application.

12 Defendant's argument that compliance with the First Amendment and Arizona  
13 law is procedurally "not possible" is equally unavailing. [*Id.* at 3.] WNI is unaware of  
14 any case law supporting the notion that First Amendment rights may be violated if  
15 complying with the Constitution poses an added administrative burden. *Cf. Phoenix*  
16 *Newspapers, Inc. v. District Court*, 156 F.3d 940, 951 (9th Cir. 1998) (the First  
17 Amendment's substantive and procedural requirements "are not mere punctilios, to be  
18 observed when convenient"). To the contrary, the Seventh Circuit in *United States v.*  
19 *Blagojevich* – the *only* case on which Defendant relies – recognized that "a judge not  
20 only must make the [required] findings...but also must consider alternatives to secrecy,  
21 whether or not the lawyers propose some." 612 F.3d 558, 565 (7th Cir. 2010). The  
22 *Blagojevich* court remanded for a prompt, public hearing and appropriate factual  
23 findings on the record. *See id.* at 564 (holding that, without such findings, the  
24 presumption in favor of disclosure had *not* been rebutted). In any event, Defendant's  
25 Objection provides at least one way of addressing the sealed records – that is, by  
26 grouping them topically. [Objection at 3 ("[T]hese five categories may overlap with  
27 each other, but we found this a helpful way to attempt to look at the specific sealed  
28 documents and proceedings.").]

1 II. WNI'S APPLICATION IS TIMELY, AND ITS CONSTITUTIONAL RIGHTS  
2 HAVE NOT BEEN WAIVED.

3 Defendant's contention that WNI's Application is untimely lacks merit. Courts  
4 routinely permit interveners to attack overly broad sealing or protective orders well after  
5 issuance. "Indeed, delays measured *in years* have been tolerated where an intervener is  
6 pressing the public's right of access to judicial records." *San Jose Mercury News, Inc.*  
7 *v. District Court*, 187 F.3d 1096, 1101 (9th Cir. 1999) (emphasis added) (citing *Public*  
8 *Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 785 (1st Cir. 1988) (collecting cases)).  
9 WNI cannot be accused of sitting idly on its hands when the sealing started only a few  
10 months ago. [See Objection at 2-3 (explaining that most sealing started with "jury  
11 issues" in May 2010).] Then, WNI discovered that a large percentage of the September  
12 filings had been simply "purged from the file." WNI filed its Application immediately  
13 thereafter to assert its, and the public's, right of access. See Ariz. Sup. Ct. Admin. Order  
14 95-35 at 1 (news organizations play an important role in conveying information to the  
15 public about the judiciary, and are uniquely situated to advocate for open courtroom  
16 proceedings). Under these authorities, WNI's Application is unquestionably timely and  
appropriate.

17 Defendant's reliance on *Blagojevich* for this point is again misplaced. In holding  
18 that the motion to intervene *was* timely, the *Blagojevich* court noted that the "trial is  
19 ongoing" and that "the controversy is live." 612 F.3d at 560. Significantly, the court  
20 did *not* find that interveners had waived their rights by failing to intervene earlier when  
21 the judge "mused in open court" about the possibility of sealing juror identities. *Id.*  
22 Rather, the Seventh Circuit found that, because there was never a public announcement  
23 identifying the juror issue and specifying a schedule for its resolution, the trial judge had  
24 abused his discretion by denying the motion to intervene. *Id.* at 561. In this case, WNI  
25 and the public have similarly been denied an opportunity to participate *before* many of  
26 the records and proceedings were sealed.

1 III. EVEN IF SOME INFORMATION WARRANTS SEALING, THE LAW  
2 REQUIRES THAT ONLY TRULY CONFIDENTIAL MATERIAL BE  
3 REDACTED AND THE REMAINDER RELEASED.

4 Both parties have indicated that an undefined number of records and proceedings  
5 are sealed to protect juror identities consistent with the Court's May 6, 2010 Order.  
6 Although some portion of these records may warrant sealing under the First Amendment  
7 and Arizona law (*cf.* A.R.S. § 21-312), the Order lacks all of the required on-the-record  
8 findings. *E.g., Phoenix Newspapers, Inc.*, 156 F.3d at 949 (identification of compelling  
9 interest and lack of alternative means of protecting that interest); Ariz. R. Sup. Ct.  
10 123(d) ("[T]he court shall state the reason for the action, including a reference to any  
11 statute, case, rule or administrative order relied upon."). Instead, the Order simply  
12 directs the clerk to seal certain Minute Entries that "may" disclose juror identity and  
13 information. With such a broad sealing order in place, WNI cannot verify which records  
14 are sealed for "juror issues" or fall into the four other categories of sealed documents  
15 identified by Defendant. [Objection at 2-3.]

16 Moreover, the May 6 Order asks the clerk to seal the *entirety* of the subject  
17 Minute Entries. The Court, however, must explore alternatives to wholesale closure,  
18 including the redaction of confidential information only. Ariz. R. Sup. Ct. 123(f)(4)(B).  
19 To the extent confidential information, including juror names, could be redacted from  
20 the sealed records and proceedings, and the remainder released, WNI asks that the Court  
21 do so. Once the necessity for closure no longer exists, WNI also asks that all records  
22 and proceedings be unsealed. *Phoenix Newspapers, Inc.*, 156 F.3d at 947-48.

### 23 Conclusion

24 For the foregoing reasons, the Court should grant WNI's Application, review the  
25 sealed records and proceedings, make the required on-the-record findings and seal only  
26 those records, or portions of them, that truly merit closure under the First Amendment  
27 and Arizona law.  
28

1 RESPECTFULLY SUBMITTED this 22nd day of October, 2010.

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11 for filing this 22nd day of October, 2010 to:

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13 Yavapai County Superior Court  
14 120 South Cortez St.  
15 Prescott, Arizona 86303

16 COPY of the foregoing hand delivered  
17 this 22nd day of October, 2010 to:

18 Hon. Warren R. Darrow  
19 Judge Pro Tem B  
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21 Prescott, Arizona 86303

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